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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 559 11

DOUBLEDAY & COMPANY, INC.,
Appellant,

vs.

PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

WHITNEY NORTH SEYMOUR,
Counsel for appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 539

DOUBLEDAY & COMPANY, INC.,

Appellant,

vs.

PEOPLE OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

The nature of the case and the other considerations which sustain jurisdiction of this appeal have already been fully set forth in appellant's Statement as to Jurisdiction. Since that statement was prepared, the decision below of the Court of Appeals has been reported in 297 N. Y. 687.

The Book

The judgment below affirmed a conviction of the appellant for publishing and selling "Memoirs of Hecate County," by Edmund Wilson. That book is a serious work of *bona fide* literature, recognized as such by the literary world and commented upon seriously by contemporary experts in the field.

In support of its motion to dismiss or affirm, the appellee has seen fit to summarize the book in a fashion which we

consider to be a grotesque distortion of the whole. Upon the argument of this appeal, the appellant will have occasion to direct the Court's attention to the book itself and to the many criticisms and summaries of it which were published contemporarily. For purposes of this motion it may suffice to quote the review published by the Library of Congress in *The United States Quarterly Book List* (Vol. 2, No. 3, September, 1946, at p. 183), a highly selective publication designed to give notice to the other American republics of recently issued books of a scientific, historical, literary or artistic nature (see *ibid.*, p. iii):

> "Wilson, Edmund. Memoirs of Hecate County. Garden City, N. Y., Doubleday. 338 p. 20 cm. $2.50. 46-2116.
>
> "Described on the dust jacket as 'fiction,' these loosely related chronicles bear internal evidence that they are to some extent reflective and critical autobiography. All have in common characters summering in Hecate County, an imagined well-to-do suburban colony near New York.
>
> "Although all the pieces have the style of the polished and subtle raconteur, the tone and subject matter vary from social reporting to fantasy. Consequently, the reader may at times find himself speculating upon the sources of Mr. Wilson's data instead of devoting himself to the book as a work of art. Three of the stories have been published before. Of these, The Man Who Shot Snapping Turtles tells of a sinister esthete who descends from campaigning to protect ducks as objects of beauty to exploiting their natural enemies, snapping turtles, for financial gain. In Ellen Terhune, the character of a woman composer is discovered and accounted for through the fantasy of visits into her family past.

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"Of the new sketches, The Princess with the Golden Hair fulfills best the statement of the jacket —'the adventures of an egotist among the bedeviled.' Essentially, this is a story of seduction, disappointment, and failure, upon the part of the egotist, to face up to any reality when his ideals collapse. The contrast between Imogen, the princess, and Anna, the proletarian, is perhaps too doggedly pursued; the seduction scenes are purposely almost clinical in their physical detail. The total effect of the story, however, derives from the self and social analysis, more courageous than smug.

"The Milhollands and Their Damned Soul is a knowing satire on the industrialization of publishing, and its ramifications in book selection clubs, book reviewing, and advertising. As a whole, the MEMOIRS satirize a relatively small but influential group who consider themselves an intellectual and cultural elite.

"Wilson, Edmund. Born 1895. Educated at Princeton University, A. B., 1916. Member of staff, *The New Yorker*. Publications: I THOUGHT OF DAISY, 1929; AXEL'S CASTLE; a study in the imaginative literature of 1870-1930, 1931; TO THE FINLAND STATION; a study in the writings and acting of history, 1940; and other works."

The Federal Question Presented Is Substantial

Appellant, in its Statement as to Jurisdiction, has already set out in some detail the reasons why the federal question here presented is a substantial one. To restate the point briefly: the statute under consideration, as construed and applied by the courts below, deserves the consideration of this Court in the light of the fact that the clear and present danger test has now become the well settled working prin-

ciple to be used in applying the prohibitions of the First Amendment and it was not applied below.

The appellee's statement in support of its motion to dismiss or affirm makes no reference whatever to the clear and present danger test. Other than *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), which has already been treated in the Statement as to Jurisdiction (p. 13), it cites no decision of this Court dealing with that test.

The only other decision of this Court cited, *Robertson* v. *Baldwin*, 165 U. S. 275 (1897), concerned the constitutionality of an act conferring on state courts the power to apprehend deserting seamen. Except for *Rebuhn* v. *Cahill*, 31 F. Supp. 47 (S. D. N. Y. 1939), all the lower federal court decisions upon which the appellee relies were decided before the enunciation of the clear and present danger test, *Schenck* v. *United States*, 249 U. S. 47 (1919), and none involved a serious work of *bona fide* literature. The *Rebuhn* case was a suit to restrain prosecution of an indictment and the comments there made with respect to freedom of the press took no cognizance of the test which we urge should be applied on this appeal.

Finally, the very citation by the appellee of Cooley's *Constitutional Limitations* (8th Ed.), p. 886, emphasizes the substantial nature of the constitutional question here presented. For Professor Cooley's remarks on the subject of blasphemy, obscenity, etc. were based upon his theory that the great liberties protected by the First Amendment are limited only to the area covered by "the common-law rules which were in force when the constitutional guaranties were established." And that theory, we believe, has been thoroughly discredited and laid to rest by this Court in *Bridges* v. *California*, 314 U. S. 252, 265 (1941).

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Conclusion

The very dearth of authority cited in appellee's moving papers thus serves to underscore the point upon which we have expounded more fully in appellant's Statement as to Jurisdiction. That is: that this case presents a timely and grave constitutional issue which has never before been presented to this Court. It should be entertained and considered in the light of the recent monumental strides made by this Court in the development of the law governing the freedoms guaranteed by the First Amendment.

The motion to dismiss or affirm should be denied.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
Counsel for appellant.

February 3, 1948